

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KEVIN ROBERT BLAIR,	)	
	)	No. CV-09-0314-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,	)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 10, 17.) Attorney Rebecca M. Coufal represents Kevin R. Blair (Plaintiff); Special Assistant United States Attorney Kathryn A. Miller represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for the Defendant.

Plaintiff applied for disability insurance benefits (DIB) on August 29, 2006. (Tr. 169-73.) He alleged disability due to anxiety, neuropathy, gout, hypertension, hypothyroid, and obesity, with an onset date of July 31, 2005. (Tr. 169, 181.) Following denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge (ALJ) Paul Gaughen

1 April 10, 2008; a supplemental hearing was held on January 14, 2009.  
2 (Tr. 36-107.) Plaintiff was represented by counsel at both  
3 hearings. Plaintiff and his spouse, Brenda Blair, testified at the  
4 first hearing; at the second hearing Plaintiff, medical expert  
5 Ronald Klein, Ph.D., and vocational expert Deborah LaPoint  
6 testified. On February 13, 2009, ALJ Gaughen denied benefits. (Tr.  
7 25-34.) The Appeals Council denied review, and this appeal followed  
8 (Tr. 1-4.) Jurisdiction is appropriate pursuant to 42 U.S.C. §  
9 405(g).

#### 10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
12 court set out the standard of review:

13 The decision of the Commissioner may be reversed only if  
14 it is not supported by substantial evidence or if it is  
15 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
16 1097 (9th Cir. 1999). Substantial evidence is defined as  
17 being more than a mere scintilla, but less than a  
18 preponderance. *Id.* at 1098. Put another way, substantial  
19 evidence is such relevant evidence as a reasonable mind  
20 might accept as adequate to support a conclusion.  
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
22 evidence is susceptible to more than one rational  
23 interpretation, the court may not substitute its judgment  
24 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
25 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,  
26 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,  
28 resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180  
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
3 The Commissioner's findings are upheld if supported by inferences  
4 reasonably drawn from the evidence. *Batson v. Commissioner of*  
5 *Social Sec.*, 359 F.3d 1190, 11193 (9<sup>th</sup> Cir. 2004). Nevertheless, a  
6 decision supported by substantial evidence will be set aside if the  
7 proper legal standards were not applied in weighing the evidence and  
8 making the decision. *Browner v. Secretary of Health and Human*  
9 *Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is substantial  
10 evidence to support the administrative findings, or if there is  
11 conflicting evidence that will support a finding of either  
12 disability or non-disability, the finding of the Commissioner is  
13 conclusive. *Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005);  
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 15 SEQUENTIAL PROCESS

16 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
17 requirements necessary to establish disability:

18 Under the Social Security Act, individuals who are  
19 "under a disability" are eligible to receive benefits. 42  
20 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
21 medically determinable physical or mental impairment"  
22 which prevents one from engaging "in any substantial  
23 gainful activity" and is expected to result in death or  
24 last "for a continuous period of not less than 12 months."  
25 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
26 from "anatomical, physiological, or psychological  
27 abnormalities which are demonstrable by medically  
28 acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a  
claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

1 In evaluating whether a claimant suffers from a  
2 disability, an ALJ must apply a five-step sequential  
3 inquiry addressing both components of the definition,  
4 until a question is answered affirmatively or negatively  
5 in such a way that an ultimate determination can be made.  
6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
7 claimant bears the burden of proving that [s]he is  
8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
9 1999). This requires the presentation of "complete and  
10 detailed objective medical reports of h[is] condition from  
11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
12 404.1512(a)-(b), 404.1513(d)).

### 13 STATEMENT OF FACTS

14 The facts of the case are set forth in detail in the transcript  
15 of proceedings and are briefly summarized here. Plaintiff was 44  
16 years old at the time of the hearing. (Tr. 49.) He had an 11<sup>th</sup>  
17 grade education and a high-school equivalency degree. He obtained  
18 a real estate license that was expired at the time of the hearing,  
19 and computer certification. (Tr. 48.) Plaintiff testified he spent  
20 a short time in the military but was discharged due to anxiety  
21 problems. (Tr. 49.) Plaintiff has past work experience as a file  
22 clerk, an office helper, a weed inspector and a casino host. (Tr.  
23 89.) At the time of the hearing, Plaintiff was living with his  
24 spouse and daughter-in-law. (Tr. 63.) He stated he could not work  
25 because of panic attacks and an inability to stand on his feet for  
26 any length of time. (Tr. 50.) He later testified he could stand for  
27 an hour and walk for 15 to 20 minutes before he experienced pain in  
28 his feet, which he attributed to neuropathy. (Tr. 57, 67.) He  
stated he had low energy and low blood sugar due to diabetes.  
Plaintiff reported he was unable to be around people and suffered  
serious panic attacks when he had to be with the public. (Tr. 54-  
57.) He also reported a problem with alcohol, which he used

1 excessively to "self medicate." (Tr. 60-61.) However, he stated he  
2 had quit drinking a few months before the hearing. (Tr. 61.)

### 3 ADMINISTRATIVE DECISION

4 The ALJ found Plaintiff was insured for DIB through September  
5 30, 2008. (Tr. 27.) At step one, he found Plaintiff had not  
6 engaged in substantial gainful activity since July 31, 2005, the  
7 alleged onset date. (*Id.*) At step two, he found Plaintiff had the  
8 severe impairments of alcohol dependence in remission, anxiety-  
9 related disorder, diabetes mellitus, and hypertension subject to  
10 variable control. (*Id.*)

11 At step three, the ALJ found Plaintiff's impairments, alone or  
12 in combination, did not equal one of the listed impairments in 20  
13 C.F.R. Part 404, Subpart P, Appendix 1 (Listings). (Tr. 28-30.) At  
14 step four, he determined Plaintiff had the residual functional  
15 capacity (RFC) to perform medium work with several non-exertional  
16 physical and mental limitations. (Tr. 30.) The ALJ found Plaintiff's  
17 statements regarding the intensity of his symptoms and work related  
18 limitations were not credible to the extent they were inconsistent  
19 with the RFC findings. (Tr. 31-33.) Considering vocational expert  
20 testimony, the ALJ found Plaintiff could still perform his past work  
21 as a weed inspector and file clerk as actually and generally  
22 performed. (Tr. 33.) He concluded Plaintiff was therefore not under  
23 a disability as defined by the Social Security Act. (Tr. 34.)

### 24 ISSUES

25 The question presented is whether there is substantial evidence  
26 to support the ALJ's decision denying benefits and, if so, whether  
27 that decision is based on proper legal standards. Plaintiff  
28

1 contends the ALJ erred when he: (1) failed to identify panic  
2 disorder, personality disorder, and peripheral neuropathy as severe  
3 impairments at step two; (2) improperly assessed his credibility;  
4 (3) failed to fully develop the record; and (4) improperly evaluated  
5 medical evidence. (Ct. Rec. 11 at 10-19.)

## 6 DISCUSSION

### 7 A. Credibility

8 Plaintiff argues that the ALJ's credibility determination is  
9 not supported by legally sufficient reasons. (Ct. Rec. 11 at 13-  
10 16.) *De novo* review of the record does not support this assertion.  
11 The ALJ summarized Plaintiff's testimony, written disability report,  
12 function reports, and statements to medical providers and made  
13 specific credibility findings explaining why he discounted  
14 Plaintiff's allegations to the extent they were inconsistent with  
15 the final RFC assessment. (Tr. 30-33.)

16 Although credibility determinations are the sole province of  
17 the ALJ, when the adjudicator finds a claimant's statements  
18 regarding the severity of impairments and limitations are not  
19 credible, he must make a credibility determination with findings  
20 sufficiently specific to permit the court to conclude the ALJ did  
21 not arbitrarily discredit claimant's allegations. *Richardson*, 402  
22 U.S. at 400; *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir.  
23 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991) (en  
24 banc); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989).  
25 Nonetheless,

26 An ALJ cannot be required to believe every allegation of  
27  
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1        disabling pain, or else disability benefits would be  
2        available for the asking, a result plainly contrary to 42  
3        U.S.C. § 423 (d)(5)(A). . . . This holds true even where  
4        the claimant introduces medical evidence showing that he  
5        has an ailment reasonably expected to produce some pain;  
6        many medical conditions produce pain not severe enough to  
7        preclude gainful employment.

8        *Fair*, 885 F.2d at 603. Further, in assessing credibility, the ALJ  
9        need not totally reject or accept a claimant's statements. Based on  
10       consideration of all the evidence in the record, the ALJ may find  
11       the claimant's statements regarding limitations, symptoms, and pain  
12       credible "to a certain degree." *SSR 96-7p*.

13       If there is no affirmative evidence that the claimant is  
14       malingering, the ALJ must provide "clear and convincing" reasons for  
15       rejecting the claimant's allegations regarding the severity of  
16       symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). The  
17       ALJ engages in a two-step analysis in deciding whether to admit a  
18       claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d  
19       1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the ALJ must find  
20       the claimant has produced objective medical evidence of an  
21       underlying impairment, and that the impairment, or combination of  
22       impairments, "could reasonably be expected to produce pain or other  
23       symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986).  
24       Once the *Cotton* test is met, the ALJ must evaluate the credibility  
25       of the claimant. In addition to ordinary techniques of credibility  
26       evaluation, the ALJ may consider the following factors when weighing  
27       the claimant's credibility: the claimant's reputation for  
28       truthfulness; inconsistencies either in his allegations of  
29       limitations or between his statements and conduct; daily activities

1 and work record; and testimony from physicians and third parties  
2 concerning the nature, severity, and effect of the alleged symptoms.  
3 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997); *Fair*,  
4 885 F.2d 597 at n.5. Evidence of a tendency to exaggerate and  
5 secondary gain motives are legitimate reasons to discount a  
6 claimant's symptom allegations. See *Tonapetyan v. Halter*, 242 F.3d  
7 1144, 1148 (9<sup>th</sup> Cir. 2001); *Matney on Behalf of Matney v. Sullivan*,  
8 981 F.2d 1016, 1020 (9<sup>th</sup> Cir. 1992). The ALJ may also consider an  
9 unexplained failure to follow treatment recommendations and  
10 testimony by the claimant "that appears less than candid."  
11 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2008). If the  
12 ALJ's credibility finding is supported by substantial evidence in  
13 the record, "the court may not engage in second-guessing." *Thomas*,  
14 278 F.3d at 959; *Fair*, 885 F.2d at 604.

15 As found by the ALJ, Plaintiff met his burden to provide  
16 evidence of medical conditions, i.e., diabetes and anxiety related  
17 disorder, that could be expected to cause the alleged symptoms.  
18 (Tr. 31.) The ALJ then identified objective evidence of Plaintiff's  
19 tendency to exaggerate limitations. (Tr. 32.) Plaintiff argues  
20 this is not "affirmative evidence" of malingering and, therefore,  
21 insufficient to reject his credibility. However, the ALJ gave  
22 other "clear and convincing" reasons supported by substantial  
23 evidence for discounting Plaintiff's statements.<sup>1</sup> (Tr. 32-33, 344.)  
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25  
26 <sup>1</sup> As explained by the Commissioner in his policy ruling, the  
27 ALJ need not totally reject a claimant's statements; he or she may  
28 find the claimant's symptom testimony to be credible to a certain

1 For example, contrary to Plaintiff's reports of disabling panic  
2 attacks, the ALJ found examining psychologists did not opine his  
3 panic attacks precluded all work and suggested Plaintiff's ability  
4 to work in more social environments might be improved if he accessed  
5 recommended counseling services. The ALJ also noted observations  
6 from examining doctors that Plaintiff's reported alcohol abuse might  
7 be worsening his panic attacks. As reported by Plaintiff, he was  
8 drinking excessive amounts of alcohol to "self-medicate," but when  
9 he stopped and started prescribed medication, he reported medication  
10 helped him "stay normal." (Tr. 31, 267.) The ALJ also referenced  
11 Plaintiff's report that he could work alone in an office or with  
12 limited social interaction as inconsistent with his allegations of  
13 total disability. (Tr. 32, 269.)

14 As for the alleged neuropathy symptoms and exertional  
15 limitations, the ALJ found diagnosed diabetes and gout could cause  
16 limitations, but medical sources found no evidence to support the  
17 degree of limitation alleged. (Tr. 32-33.) This finding is supported  
18 by medical records showing Plaintiff denied numbness and tingling in  
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20  
21 degree, but discount statements based on his interpretation of  
22 evidence in the record as a whole. *Social Security Ruling (SSR)* 96-  
23 7p. Although Social Security Rulings are not published in the  
24 federal register and do not have the force of law, under the case  
25 law, deference is to be given to the Commissioner's interpretation  
26 of the Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9<sup>th</sup> Cir.  
27 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9<sup>th</sup> Cir. 1991).  
28

1 June 2006, and infrequently reported problems standing. Clinic  
2 notes also include observations by Plaintiff's treating physician of  
3 normal gait and strength, and no signs of gout on exam. (Tr. 366.)  
4 The ALJ specifically noted observations of the examining  
5 psychologists during testing: Plaintiff "displayed no pain  
6 behaviors, sat easily and quickly and remained seated for an hour  
7 without discomfort or significant postural changes, stood easily and  
8 walked quickly and fluidly." (Tr. 33, 268, 346.) The ALJ's  
9 credibility findings are a rational interpretation of the record in  
10 its entirety. Plaintiff has made no showing that the ALJ erred in  
11 his reasoning. The ALJ's credibility findings are specific, "clear  
12 and convincing" and, thus, will not be disturbed.

13 **B. Step Two: Severe Impairments**

14 Plaintiff argues that the ALJ should have included "all  
15 diagnoses of the psychologists" and "peripheral neuropathy,"  
16 allegedly diagnosed by his treating doctor, as severe impairments.  
17 (Ct. Rec. 11 at 11.) To satisfy step two's requirement of a severe  
18 impairment, the claimant must prove the existence of a physical or  
19 mental impairment by providing medical evidence consisting of signs,  
20 symptoms, and laboratory findings; the claimant's own statement of  
21 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508; *Taylor v.*  
22 *Heckler*, 765 F.2d 872, 876 (9<sup>th</sup> Cir. 1985). However, the standard  
23 for a severe impairment at step two is not satisfied by diagnosis  
24 alone. As explained by agency regulations and case law, the fact  
25 that a medically determinable condition exists does not  
26 automatically mean the symptoms are "severe" or "disabling" as  
27 defined by the Social Security regulations. *See, e.g., Edlund*, 253

1 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v. Heckler*, 754 F.2d  
2 1545, 1549-50 (9<sup>th</sup> Cir. 1985).

3 On review, it is noted that while neuropathy is a recognized  
4 complication of diabetes (See Listing 9.08) that may preclude work  
5 activities, the record contains no formal diagnosis by an acceptable  
6 medical source of "peripheral neuropathy," as contended by  
7 Plaintiff. See 20 C.F.R. § 404.1527(a). The August 26, 2006,  
8 clinic note cited by Plaintiff as support for his contention that he  
9 has medically determinable neuropathy states only that Plaintiff was  
10 "complaining" of diabetic peripheral neuropathy. (Tr. 280.)  
11 Nonetheless, on exam that day, treating physician Richard Gascoigne,  
12 M.D., found "no signs of gout, joint effusions or cellulitis"; and  
13 his notes contain no assessment or diagnosis of neuropathy. (*Id.*)  
14 Clinic notes also indicate Dr. Gascoigne discussed with Plaintiff  
15 the effects of Plaintiff's excessive drinking on gout. (Tr. 288,  
16 290). Further, an assessment by Dr. Gascoigne of "slight decreased  
17 sensation over the ball of the right foot" (Tr. 280), does not  
18 support a diagnosis of peripheral neuropathy and is insufficient to  
19 satisfy the step two requirement for a medically determinable  
20 impairment.

21 As discussed above, the ALJ properly found Plaintiff's alleged  
22 neuropathy symptoms are not reliable because they are unsupported by  
23 medical evidence and inconsistent with observations of examining  
24 psychologists Severingson and Everhart. A claim of disabling  
25 "neuropathy" is also inconsistent with Plaintiff's own report to his  
26 treating physician that he could stand several hours before  
27 experiencing pain in his feet. (Tr. 366, 379.) Because the record  
28

1 does not contain a physician's diagnosis of neuropathy, the ALJ did  
2 not err in excluding it from the step two findings. *Ukolov v.*  
3 *Barnhart*, 420 F.3d 1002, 1005-06 (9<sup>th</sup> Cir. 2005) (medical diagnosis  
4 based on clinical diagnostic techniques required to support finding  
5 of impairment). The ALJ properly noted and discounted Plaintiff's  
6 reported limitations in standing, based on the assessment of  
7 episodic gout due to alcohol abuse and diabetes. (Tr. 33, 280,  
8 290.) The ALJ properly addressed the credible exertional symptoms  
9 in the final RFC determination by including a sit/stand option.  
10 (Tr. 30.) Thus, even if sporadic gout were erroneously excluded as  
11 a non-severe impairment, Plaintiff was not prejudiced; therefore any  
12 error would be harmless. See *Shinseki v. Sanders*, 129 S.Ct. 1696,  
13 1706 (2009) (burden to show harm of claimed error on party attacking  
14 agency determination).

15       Regarding panic attacks, Plaintiff's argument is without merit.  
16 The ALJ identified Anxiety Related Disorder as a severe impairment.  
17 As stated in Listing 12.06, in anxiety related disorders, anxiety is  
18 the predominant disturbance, accompanied by "recurrent severe panic  
19 attacks manifested by a sudden unpredictable onset of intense  
20 apprehension, fear, terror and sense of impending doom . . . ." See  
21 Listing 12.06 A 2. Plaintiff fails to show how the exclusion of  
22 "panic attacks" in the step two findings prejudiced him when (1)  
23 panic attacks are included in the general category of "Anxiety  
24 Related Disorder," an identified severe mental impairment at step  
25 two, and (2) the ALJ acknowledged in his step four findings that  
26 Plaintiff had moderate mental limitations in social functioning due  
27 to panic attacks.

1 Finally, Plaintiff's conclusory argument that it was error of  
2 law to exclude personality disorder as a severe impairment is  
3 rejected. (Ct. Rec. 11 at 11.) Because Plaintiff fails to argue  
4 this issue with specificity in his briefing, the court will not  
5 address it on appeal. See *Carmickle v. Commissioner, Social Sec.*  
6 *Admin.*, 533 F.3d 1155, 1161 n.2 (9<sup>th</sup> Cir. 2008). The ALJ's step two  
7 findings are supported by substantial evidence and free of legal  
8 error.

9 **C. Development of the Record**

10 Plaintiff appears to argue remand is necessary to allow  
11 consideration of medical records allegedly lost by the agency. He  
12 speculates 45 pages of clinic notes from North Basin Medical Clinic  
13 that were submitted prior to the first ALJ hearing may not have been  
14 reviewed by the ALJ. (Ct. Rec. 11 at 11-13; see also Tr. 44.) An  
15 ALJ's duty to supplement the record is triggered by ambiguous  
16 evidence or when the record is inadequate to properly evaluate the  
17 evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9<sup>th</sup> Cir 2001);  
18 *Tonapetyan*, 242 F.3d at 1150. The claimant must show prejudice or  
19 unfairness in the proceedings to be entitled to a remand. *Hall v.*  
20 *Secretary of Health, Ed. and Welfare*, 602 F.2d 1372, 1378 (9<sup>th</sup> Cir.  
21 1979). Without a showing of prejudice an error may be considered  
22 harmless. *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050,  
23 1056 (9<sup>th</sup> Cir. 2006).

24 Here, Plaintiff gives no indication what was included in the  
25 alleged missing records, or how they may have changed the outcome.  
26 Further, a review of the court file indicates Defendant filed a  
27 supplement to the administrative record on review on August 10,  
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2010, apparently in response to Plaintiff's assertion that the record is incomplete. The supplement includes a missing page from the hearing transcript (Ct. Rec. 16 at 352), and North Basin Medical Clinic notes from treating physician, Dr. Gascoigne. (*Id.* at 353-81.) About 25 pages relate to treatment between August 2006 and July 2007. (Tr. 366-81.) However, Plaintiff did not object to or address the supplemented record in a Reply to Defendant's submission, or explain how he was prejudiced by the omission of these records from the administrative record initially filed with the court. In addition, it is noted on review of the April 10, 2008, hearing transcript that the ALJ was aware of the records in question and specifically stated he had reviewed them prior to the first hearing. (Tr. 44-45.) Plaintiff's assertion that remand is necessary for consideration of additional records by the ALJ fails.

**D. Lay Witness Testimony**

At the hearing, Plaintiff's spouse testified briefly regarding Plaintiff's limitations. (Tr. 68-71.) Her testimony supplemented a written statement included in the record. (Tr. 211-19.) Plaintiff claims the ALJ failed to consider or address her testimony. (Ct. Rec. 11 at 16.) This argument is without merit.

Ms. Blair's testimony is considered a non-medical "other source" evidence. 20 C.F.R. §404.1513(d). Testimony regarding an claimant's symptoms and how they affect his ability to work is competent evidence and must be considered by the ALJ. If testimony from friends or relatives is rejected, the ALJ must give reasons that are "germane" to the witness. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). However, information from non-medical sources

1 cannot establish the existence of an impairment or disability. SSR  
2 06-03p. In evaluating evidence from family members, the ALJ may  
3 consider whether the statements are consistent with other evidence  
4 and other factors that might support or refute the evidence. *Id.*  
5 The Commissioner's policy ruling directs as follows:

6       Although there is a distinction between what an  
7 adjudicator must consider and what the adjudicator must  
8 explain in the disability determination or decision, the  
9 adjudicator generally should explain the weight given to  
10 opinions of these [non-medical] "other sources," or  
11 otherwise ensure that the discussion of the evidence in  
the determination or decision allows a claimant or  
subsequent reviewer to follow the adjudicator's reasoning  
when such opinions may have an effect on the outcome of  
the case.

12 SSR 06-03p, *Evidence from "Non-Medical Sources"*. (Emphasis added.)

13       Here, the ALJ specifically noted Mrs. Blair's testimony and  
14 found, "The undersigned also considered the third party function  
15 report from the claimant's wife and noted that his daily activities  
16 are quite significant." (Tr. 33, 211, 213, 215.) To that extent,  
17 the ALJ accepted the testimony and gave it weight in his  
18 determination that Plaintiff was not totally disabled. Independent  
19 review reveals Mrs. Blair's testimony regarding her spouse's  
20 limitations and symptoms mirrors Plaintiff's testimony and  
21 functional reports, which the ALJ specifically discounted by  
22 detailed reference to medical evidence and observations of  
23 acceptable medical sources. (Tr. 30-33, 68-71, 203, 205-08.)  
24 Because the court may draw inferences logically flowing from record  
25 in its entirety, it follows the ALJ gave similar weight Ms. Blair's  
26 similar testimony. *See Valentine v. Astrue*, 574 F.3d 685, 694 (9<sup>th</sup>  
27 Cir. 2009). Further, Plaintiff fails to specify which testimony  
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1 from Mrs. Blair regarding his ability to work was erroneously  
2 ignored, how it is supported by credible evidence in the record, and  
3 in what way her non-medical evidence could have affected the outcome  
4 of the case. Without the requisite specificity and analysis  
5 supported by the record, Plaintiff has not met his burden to show  
6 error. *Shinseki*, 129 S.Ct. at 1706; *Carmickle*, 533 F.3d at 1161  
7 n.2.

8 **E. Medical Evidence**

9 Plaintiff contends the ALJ should have consulted a medical  
10 expert regarding his limitations due to the "diagnosed peripheral  
11 neuropathy." (Ct. Rec. 11 at 18-19.) However, as discussed above,  
12 the medical record does not support a finding of medically  
13 determinable neuropathy, and Plaintiff's subjective characterization  
14 of his condition is inadequate to trigger further development of the  
15 record. *Mayes*, 276 F.3d at 459-60. Independent review of North  
16 Basin Medical Clinic records submitted by Defendant and purportedly  
17 missing from the records considered by the ALJ confirms the ALJ's  
18 interpretation of the medical evidence. Further, the decision to  
19 call a medical expert or order a consultative examination is within  
20 the discretion of the ALJ. *Magallanes v. Bowen*, 881 F.2d 747, 753  
21 (9<sup>th</sup> Cir. 1989). As consistently ruled by the Ninth Circuit, it is  
22 the province of the ALJ to resolve ambiguities and/or conflicts in  
23 the medical evidence, and the court may not second guess his  
24 determinations as long as they are supported by the record. *Vasquez*  
25 *v. Astrue*, 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009); *Meanel v. Apfel*, 172  
26 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999); *Andrews*, 53 F.3d at 1039 (if  
27 supported by substantial evidence, findings of the Commissioner  
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1 shall be affirmed even if "evidence is susceptible to more than one  
2 rational interpretation").

3       The clinic notes at issue show that between May 2004 and July  
4 2007, Plaintiff was seen by Dr. Gascoigne seven times, primarily for  
5 the effects of alcohol abuse and treatment of uncontrolled blood  
6 pressure. (Tr. 360-81.) In May 2004, Dr. Gascoigne assessed alcohol  
7 abuse withdrawal and noted Plaintiff's decreased anxiety since being  
8 on Paxil. The next record is dated August 8, 2006, and indicates an  
9 assessment of diabetes. Dr. Gascoigne observed normal gait and  
10 station, normal strength, and resolved numbness, tingling and calf  
11 pain from Plaintiff's new job, which he reported involved standing  
12 on his feet for five hours. (Tr. 366.) Plaintiff denied back pain.  
13 Plaintiff returned to North Basin Medical Clinic in December 2006 to  
14 discuss his drinking problem and intention to quit. (Tr. 368.)  
15 Clinic notes indicate Plaintiff reported no physical complaints, and  
16 Dr. Gascoigne made no physical findings. His assessment includes  
17 alcohol abuse and diabetes, but did not mention neuropathy or gout.  
18 (*Id.*) The next note is dated January 19, 2007, and indicates  
19 uncontrolled hypertension, gout, diabetes, alcohol abuse. The  
20 primary concern was hypertension. At that time, Dr. Gascoigne  
21 recommended formal alcoholism counseling, but Plaintiff declined.  
22 (Tr. 371.) In February 2007, notes indicate a diabetic follow-up  
23 for lab result and medication check; neither neuropathy nor gout was  
24 diagnosed. (Tr. 373.) In April 2007, Plaintiff reported deceased  
25 panic attacks with Paxil, decreased alcohol use and reported feeling  
26 better with "no problems physically." (Tr. 376.) The doctor noted  
27 a history of gout, diabetes, anxiety with panic attacks. The last  
28

1 clinic note is dated July 10, 2007. (Tr. 379-80.) Plaintiff  
2 complained of occasional numbness and slight burning pain in his  
3 feet. Based on Plaintiff's report, Dr. Gascoigne assessed  
4 situational panic attacks around people. The doctor's formal  
5 assessment also included diabetes, obesity, hypertension, a history  
6 of gout and increased cholesterol. (*Id.*) He also noted Plaintiff  
7 declined new medication for "diabetic neuropathy, etc." (Tr. 380.)  
8 This is the only mention of neuropathy in the physician's notes.

9 Although Plaintiff's representative requested a consultative  
10 examination to explore allegations of peripheral neuropathy, the ALJ  
11 decision not to order one was not erroneous. An adjudicator has  
12 broad discretion in ordering consultative exams, which are to  
13 resolve conflicts or ambiguities "if one exists." 20 C.F.R. §  
14 404.1519a(a)(2). The ALJ reasonably determined the evidence in its  
15 entirety does not establish the existence of medically diagnosed  
16 peripheral neuropathy; therefore additional medical evidence was not  
17 necessary.

18 Substantial evidence supports the ALJ's interpretation of the  
19 medical evidence, his step two findings and final RFC determination.  
20 Plaintiff's contention that the ALJ substituted his own speculative  
21 opinion for medical evidence is not supported by reference to the  
22 record or cogent analysis. Because the ALJ's decision is supported  
23 by substantial evidence, it may not be disturbed. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is  
26 **DENIED.**

27 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
28

1 **Rec. 17)** is **GRANTED**.

2 The District Court Executive is directed to file this Order and  
3 provide a copy to counsel for Plaintiff and Defendant. The file  
4 shall be **CLOSED** and judgment entered for **Defendant**.

5 DATED December 7, 2010.

6  
7 S/ CYNTHIA IMBROGNO  
8 UNITED STATES MAGISTRATE JUDGE  
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